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British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Securities Commission
Manitoba Securities Commission
Ontario Securities Commission
Office of the Administrator, New Brunswick
Registrar of Securities, Prince Edward Island
Nova Scotia Securities Commission
Newfoundland and Labrador Securities Commission
Registrar of Securities, Northwest Territories
Registrar of Securities, Yukon Territory
Registrar of Securities, Nunavut

c/o John Stevenson, Secretary
Ontario Securities Commission
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Toronto, Ontario M5H 3S8
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- and -

c/o Denise Brosseau, Secretary
Commission des valeurs mobilières du Québec
Stock Exchange Tower
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Dear Sirs:

Canadian Securities Administrators' Request for Comment – Proposed amendments to National Instrument 54-101, *Communication with Beneficial Owners of Securities of a Reporting Issuer*

We are writing on behalf of the Investment Dealers Association of Canada (the "IDA"), and the intermediary members it represents, to provide you with their comments on the Canadian Securities Administrators' (the "CSA") proposed amendments (the "Proposed Amendments") to National Instrument 54-101, *Communication with Beneficial Owners of Securities of a Reporting Issuer* (the "Rule").

The IDA's comments on the Proposed Amendments can be divided into three parts, as outlined below:

(1) the proposed change from the "routine business" definition to the "special meeting" definition;

(2) the proposed change so that beneficial owners would be permitted to choose to receive either (i) all proxy-related materials, (ii) only those proxy-related materials related to special meetings; or, as a new alternative, (iii) no proxy-related materials;

(3) the silence in the Proposed Amendments as to who (among a reporting issuer, an intermediary and the beneficial owner client) is required to pay for delivery of the reporting issuer's proxy-related materials to a client who is an objecting beneficial owner (an "OBO").

(1) Does the proposed definition of special meeting strike the right balance?

The IDA believes that the routine business definition and concept in the Rule does not necessarily strike a great balance in pursuit of the CSA's stated regulatory objective of attempting to strike "an appropriate balance between ensuring that beneficial owners are properly informed of the most significant issues that may have an impact on their investment in the reporting issuer and their desire not to receive material". However, the IDA also believes that the special meeting definition and concept may not necessarily strike a better balance.

As an example, the current definition of routine business includes, for a meeting, the election of directors and the proposed definition of special meeting excludes, for a meeting, the election of directors. Both of these definitions deem the election of directors as routine and not special or significant. Yet, it is a fundamental right and responsibility of shareholders to choose the persons who will look after their interests in an issuer, and so one could argue that an election of directors is significant, and the elected board of directors will ultimately have an impact on a beneficial owner's investment, therefore leading to the question of how such an event is distinguished in importance from other events which the CSA has deemed significant enough so as to require mandatory delivery of materials to beneficial owners. Even if it is accepted that the election of directors, while a significant event, is routine enough that a beneficial owner can determine in advance that it does not wish to receive proxy-related materials relating to such elections, there is a further question as to whether it should still be considered routine business under the Rule (or beyond the definition of special meeting under the Proposed Amendments) if, in respect of a particular meeting, there is a contest with respect to the composition of the board of directors. A proxy contest for the election of directors can be a very significant event in the life of an issuer and accordingly it is difficult to conclude that such an event should not fall into the non-routine or special meeting category.

As another example, non-proxy-related materials are not addressed in the Rule. Despite comments received on drafts preceding the Rule that such materials should be addressed, the CSA concluded that there was a "general lack of consensus on the point" and proceeded with the Rule without addressing such materials in its desire not to hold up the implementation of the Rule. However, non-proxy-related materials (whether they relate to take-over bids, issuer bids, rights offerings, class actions or securityholder elections in non-proxy-related matters) often relate to significant events that can be just as important as certain proxy-related materials. To the extent the Rule or any amendments will continue with an objective of trying to mandate delivery to beneficial owners of certain deemed significant materials, this whole potentially important area of non-proxy-related materials, which is being ignored in the Rule, should be considered in the context of any proposed amendments.

The Request for Comment itself recognizes the difficulty involved in reaching the appropriate balance, in that it seeks comment specifically on whether the definition of special meeting should be broader than proposed so that all meetings where shareholders are asked to approve fundamental changes to the issuer (including those meetings where minority approval is sought) would be included in the definition.

There are other examples that can be made as well to show the difficulty in striking an appropriate balance. A first example would involve mutual fund meetings, if mutual funds are not ultimately carved out of the Rule. Given that most mutual funds are not governed by corporate law, a corporate law concept (such as the proposed special meeting definition) for defining significant issues related to mutual funds may not necessarily apply. Even if the proposed special meeting definition were to be expanded beyond the corporate law concept to catch any meetings at which a resolution for a vote of greater than 50% is required, that might still not cover significant issues relating to mutual funds as, for instance, the current mutual fund rules require meetings for fundamental matters but yet only require a 50% approval.

A final example would be found in connection with shareholder proposals. There is a growing trend toward shareholder's submitting proposals in connection with annual meetings of issuers. Depending on the particular proposal, it could very well be significant enough that it would fall into the deemed significant category if such a distinction were going to be maintained.

The above discussion and examples in part highlight the complexity involved in striking an appropriate balance between what documents are to be deemed important enough, or related to significant issues, so as to require they be sent to beneficial owners regardless of the desire of beneficial owners to receive them (except where the costs issue interferes (see below *(3) Any proposed amendments to the Rule need to consider the costs issue*) and except if the Proposed Amendments permit beneficial owners to choose not to receive such materials) and what documents do not require such special treatment.

The IDA's principal comment is that there are no doubt other examples to consider and the overall matter requires fuller consideration. While it was important for the CSA to implement the Rule as a starting point, the IDA believes the matter is best served at this time by leaving the

definition of routine business in place. Given that the routine/non-routine business distinction in the Rule errs on the side of providing more materials than less to beneficial owners, there would seem to be no investor protection harm in maintaining the status quo for now, thereby allowing time and experience and further consideration to help form a determination on what changes should be made. In the interim period, discretionary applications could alleviate any unnecessary burdens on issuers and intermediaries.

Any amendments at this time to the routine business definition would pose undue costs to the intermediaries. More particularly, there was substantial effort, education, time and expense incurred by the intermediaries in connection with the implementation of the new regime under the Rule in July 2002. New paper copies of the various forms had to be drafted, new on-line computer programs and phone protocols had to be developed, investment advisors had to be educated in connection with dealing with all of the new requirements, there were significant printing costs incurred and ultimately there was the time and costs involved in devoting the personnel required to effect the changes. In addition, the transitional provisions adopted under the Rule (to deal with beneficial owners who had already made certain elections under National Policy 41 ("NP 41")) were complex and resulted in extra time and expense to intermediaries and ultimately resulted in the IDA seeking and obtaining discretionary relief to deal with certain of these transitional issues. As well, the Proposed Amendments do not clearly address how beneficial owners who made elections under NP 41 or under the Rule (prior to any amendments) should be treated once amendments are implemented. At a minimum, these transitional issues would need to be addressed in any proposed amendments.

Proposed amendments to the Rule will also have to address the costs issue discussed below under the heading *(3) Any proposed amendments to the Rule need to consider the costs issue*. Failure to address the costs issue will, among other things, result in the continued inconsistently between the requirement in the Rule for all beneficial owners, regardless of their stated choice, to have to receive certain deemed significant materials and the reality that many beneficial owners are not receiving such materials because no one is willing or required to pay the costs of delivery.

(2) Should beneficial owners be permitted to decline to receive all materials?

It is currently the case under the Rule that beneficial owners are required to receive proxy-related materials relating to non-routine business regardless of their view as to whether they wish to receive such materials.

Under the Proposed Amendments, beneficial owners would be permitted to decline to receive all proxy-related materials or, alternatively, to choose to receive only proxy-related materials relating to special meetings or, alternatively, to choose to receive all proxy-related materials.

Certain members of the IDA are of the view that the simpler the choices that have to be made by a beneficial owner, the better, and therefore suggest that it would be more useful to provide beneficial owners with two clear choices (rather than the three choices provided under the

Proposed Amendments). These members would propose that beneficial owners be able to (i) choose to receive all materials of a reporting issuer, and thereby understand that they will have to determine for themselves which materials to discard and which to retain and consider and, perhaps, act on, or alternatively (ii) decline to receive all materials, based on a clear bold prominent proviso that such choice will result in such beneficial owners not receiving materials that could involve significant issues relating to the issuer.

In the view of these members, this type of simple straightforward election would make it very clear for beneficial owners that they are responsible for determining whether they wish to receive all materials and consider each set of materials on its own merits or forego the right to receive all materials and any accompanying information, rights or protections. This approach would eliminate the need for the CSA to attempt to determine which materials are deemed significant and would also eliminate any present concerns that, given the CSA's role in drawing a line between materials that are significant and those that are not significant, beneficial owners are left with a false sense that they will receive *all* materials related to significant matters. Based on the proposed two choice alternative, beneficial owners would clearly understand that they must make their own choices and abide by the consequences of such choices.

The IDA's general view at this time, on the question of whether beneficial owners should be entitled to determine for themselves whether or not they wish to receive materials related to significant issues, is that more consideration needs to be given to the matter before any amendments are made.

While it was important for the CSA to implement the Rule as a starting point, the IDA believes the matter is best served at this time by leaving in place the current mandatory delivery requirement of materials for non-routine business. This would in turn allow time and experience and further consideration to help form a determination on what changes should be made.

More particularly, any amendments at this time to the matter would pose undue costs to the intermediaries and create added and unnecessary confusion for beneficial owners. More particularly, as stated above, there was substantial effort, education, time and expense incurred by the intermediaries in connection with the implementation of the new regime under the Rule in July 2002. New paper copies of the various forms had to be drafted, new on-line computer programs and phone protocols had to be developed, investment advisors had to be educated in connection with dealing with all of the new requirements, there were significant printing costs incurred and ultimately there was the time and costs involved in devoting the personnel required to effect the changes. In addition, the transitional provisions adopted under the Rule (to deal with beneficial owners who had already made certain elections under National Policy 41 ("NP 41")) were complex and resulted in extra time and expense to intermediaries and ultimately resulted in the IDA seeking and obtaining discretionary relief to deal with certain of these transitional issues. As well, the Proposed Amendments do not clearly address how beneficial owners who made elections under NP 41 or under the Rule (prior to any amendments) should be treated once amendments are implemented. At a minimum, these transitional issues would need to be addressed in any proposed amendments.

In conclusion, the questions surrounding delivery of materials and the choices that beneficial owners should have in this regard cannot and should not be answered until the CSA determines what the appropriate balance, if any, should be in respect of drawing a line between materials (proxy or non-proxy) related to significant issues and those not deemed to be significant. As stated under the first heading in this letter *"(1) Does the proposed definition of special meeting strike the right balance?*", the appropriate balance should not be determined at this time and, accordingly, the questions surrounding delivery of materials should not be determined at this time as well.

(3) Any proposed amendments to the Rule need to consider the costs issue

The Rule provides that intermediaries are required to deliver proxy-related materials to their clients who have chosen to be OBOs (since the issuer does not have the personal information for the client necessary to deliver the documents directly). The Rule is silent on who should pay the costs of such delivery, be it the reporting issuer, the intermediary or the client, with the exception that a reporting issuer must pay the costs for delivering materials that an OBO has otherwise declined to receive.

To the extent that a reporting issuer does not wish to incur the costs of mailing documents to OBOs through intermediaries, an intermediary may also determine that it does not wish to incur the costs of such mailings, which costs are not in the aggregate insignificant. Even if the costs of mailing seem palatable on an individual issuer basis, they are not so palatable on an aggregate basis – once an intermediary aggregates the costs for every reporting issuer in which its OBOs hold securities. The aggregate costs can become unjustifiably high for an intermediary to have to bear as a cost of doing business whereas the costs of mailing, if borne by each reporting issuer, would be contained and justifiable as a cost of the issuer doing business.

It would seem that in all provinces intermediaries are not under any obligation to send materials to OBOs if the costs for so doing are imposed on the intermediaries. For example, subsection 49(2) of the *Securities Act* (Ontario) (the "Act") and the equivalent provisions in the securities legislation of all of the other provinces (other than Manitoba) provide that an intermediary is not required to deliver such materials unless the issuer or the beneficial owner of such securities has agreed to pay the reasonable costs being incurred by the registrant in so doing. Furthermore, it would seem that the relationship between an intermediary and its client does not necessarily prevent the intermediary from taking such a position, where notice has been provided to the client that the intermediary will not pay the costs of delivery and therefore the client may not receive securityholder materials unless the client is willing to pay for the costs of delivery. Accordingly, it is our view that the absence in Manitoba of a statutory provision such as subsection 49(2) of the Act does not result in any greater onus being placed on intermediaries. We welcome any comments the Manitoba Securities Commission may have on this point.

It has become apparent that various approaches are being taken by intermediaries on the question of who will bear the costs of delivery of materials to OBOs. These differing approaches are

producing at least two negative consequences. First, in some circumstances, the effect is that OBOs may not receive proxy-related materials that they wish to receive or that are deemed by the Rule important enough that they should receive, while in other circumstances OBOs are having imposed on them the costs of mailing and sometimes for materials they do not necessarily wish to receive. Second, the differing approaches being taken by intermediaries result in unequal treatment amongst beneficial owners and ultimate confusion in the marketplace.

It would seem that it was deemed important enough by the CSA that beneficial owners have the right to object to their personal information being conveyed to the issuer and thereby become an OBO. It would also seem that it was deemed important enough by the CSA that beneficial owners be able to choose whether or not they wish to receive proxy-related materials. Finally, it would seem that it was deemed important enough by the CSA that beneficial owners not be able to opt out of receiving non-routine materials. However, under the Rule the result could be that routine business materials (for those who have chosen to receive such materials) and non-routine business materials (which are deemed by the Rule important enough that all beneficial owners must receive them) may not in fact be delivered to OBOs, just because they have exercised their rights to be OBOs, unless they agree to pay for such delivery or unless they have the costs imposed on them.

While the Rule recognizes that reporting issuers should be able to obtain personal information about their beneficial owners, the Rule is favouring the reporting issuers' desire to obtain such information over the beneficial owners' rights to privacy by imposing the costs of delivery (or the consequence of not receiving the materials) on the OBO. If the CSA believe that OBOs should bear the costs of delivery, the Rule should say so.

The costs issue was the subject of comment and debate through the formation process of the Rule. The first two drafts of the Rule clearly imposed the costs of delivery on OBOs (except where the issuer would choose to deliver materials to NOBOs indirectly or the issuer would choose to deliver materials despite an OBO's instructions not to receive such materials). However, it would seem the CSA ultimately made a decision against having OBOs incur such costs. The approach taken in the last two drafts, and adopted in the Rule, was to be deliberately silent on the question of who should pay the costs, permitting the market to determine the issue.

From a review of the comments that followed the various drafts of the Rule, it is clear that there was no consensus on the approach to be taken. In fact, it seems that there was such a lack of consensus that, by default, the approach became to leave the question of costs to be determined by the parties (reporting issuers, intermediaries and OBOs). However, there is really little, if any, room for negotiation amongst the various parties. The reporting issuers make their choice, which could be against paying for the costs of delivery to OBOs, and the intermediaries then make their choice where the reporting issuers have declined to pay such costs – to either impose the costs on OBOs (without their express consent) or hold back delivery unless OBOs agree to incur the costs. It is impracticable for every OBO to negotiate as to who will pay the costs of delivery. For equal treatment purposes alone, the question of who pays the costs of delivery should be dictated by the Rule.

The costs issue has been exacerbated by the change that was made from NP 41 to the Rule. Under NP 41, clients were able to decline to receive materials relating to annual or special meetings of securityholders and those who did not return their Form C were deemed to have declined to receive these materials. Under the Rule, clients are now only able to decline to receive materials for meetings at which only routine business is conducted. This change (i.e. the broadening of the circumstances in which materials must be sent to beneficial owners regardless of their stated choice) has for example meant that if a reporting issuer calls a special meeting or calls an annual meeting which results in a single shareholder proposal being placed on the agenda, the reporting issuer is now obligated to send meeting materials to all of its beneficial owners. This represents a significant increase in costs for reporting issuers, and may be a factor that has led, in the current proxy season, to reporting issuers either electing or giving serious consideration to not paying for delivery of meeting materials to OBOs.

The IDA believes that the Rule should at a minimum be amended to clearly require that either reporting issuers or OBOs must pay the costs of delivery. It is the IDA's particular view that such amendment should impose the requirement on reporting issuers. Two factors sway the balance in favour of reporting issuers having to pay such costs. First, it is the IDA's understanding that given the predominant use by reporting issuers of third party services (such as ADP Investor Communications), the costs for direct and indirect delivery of materials to NOBOs and OBOs are close to, if not, the same. If there are no material additional costs involved in delivery of materials to OBOs (beyond those applicable for delivery of materials to NOBOs), then why shouldn't the reporting issuers be as responsible for the costs of delivery to OBOs as they are for NOBOs? Second, it does not seem equitable that OBOs (by virtue of having chosen to keep their personal information private) should have to pay to receive materials, including materials they may not wish to receive but which the Rule would require that they receive.

If it is the view of the CSA that the Rule should be amended to require OBOs to pay the costs of delivery of materials, and therefore OBOs will have to choose between whether they wish to pay the costs of delivery or not receive the materials, then the CSA should revisit the whole question of why in the first place it is imposing the requirement that materials relating to non-routine business must be sent to beneficial owners, regardless of their choice. If it is the view that OBOs have the right to choose between receiving documents of all types by paying the costs of delivery or not receiving them at all, then one must step back and accept that beneficial owners generally, whether they be OBOs or NOBOs, have the right to choose whether they want to accept any materials (including materials relating to non-routine business).

As stated above, the IDA believes that the provisions in the Rule related to the costs issue are resulting in unintended outcomes that have potentially unfortunate and inconsistent consequences, resulting in the unequal treatment of beneficial owners and confusion in the marketplace. As well, these provisions are inconsistent with and are undermining the CSA requirement in the Rule that beneficial owners be required to receive certain materials that are deemed to be significant where such delivery does not in fact result because none of the issuers, intermediaries or beneficial owners is willing to will pay for the costs of delivery. If the CSA ultimately determines that beneficial owners should continue to be required, or alternatively be

given the choice, to receive certain materials deemed significant by the CSA, the costs issue must be dealt with as well so as to ensure that the costs issue does not continue to undermine the obligation or right, as the case may be, for significant materials to be delivered to OBOs.

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There were very significant operational activities and costs involved by the intermediaries in implementing the changes required by the Rule when it came into effect in July 2002. The IDA is suggesting that the activities and costs involved in implementing amendments such as the Proposed Amendments would again be significant, time consuming and expensive and yet the benefits to be gained are unclear. Accordingly, it might be more prudent at this point to have the CSA continue to consider the issues arising under the Rule and be prepared to deal with them on a case by case basis, all of which has the effect of accommodating issues on a discretionary basis and allowing for greater experience with the Rule and further consideration of the various issues prior to making any further amendments.

A number of issues has arisen since the Rule came into effect in July 2002 and a number of those issues have been resolved, in large part with the assistance and input of the Intermediaries' Sub-Committee of the CSA Advisory Committee on the implementation of the Rule. The IDA believes that the CSA's actions to date have underscored the CSA's willingness and ability to deal with the issues as they arise and, accordingly, the IDA would encourage that the approach be continued.

In closing, the IDA believes that there are a number of policy issues that need to be considered before the Proposed Amendments or any variations are implemented. While the IDA recognizes that the CSA is making every effort to try and accommodate concerns expressed by various constituencies with respect to the Rule, and in response has issued the Request for Comment on a timely basis, it is also the IDA's view that the Proposed Amendments and any related variations are premature at this time, and at a minimum would need to consider the costs issue. More particularly, it is the IDA's view that the time and expense associated with implementing amendments at this time (based on the intermediaries' experiences with implementing the Rule) would outweigh the benefits to be gained, given that any potential benefits can otherwise be achieved on a case by case basis (which the CSA has shown itself willing to consider in the appropriate circumstances).

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Please do not hesitate to contact the writer if you have any questions or comments or if you wish to meet with the IDA or a group of its representative members to further discuss their comments and concerns.

Yours truly,

"*Cathy Singer*"

Cathy Singer

CS/mll